Supreme Court, U.S.
FILED
SEP 17 2001
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No. 01-284

In The

Supreme Court of the United States

ARTHUR HOLLANDER,

Petitioner,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT AMERICAN CYANAMID COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether This Court Should Grant a Writ of Certiorari Where the United States Court of Appeals for the Second Circuit Found Petitioner's Self-Styled "Motion for Relief" Frivolous.

2. Whether This Court Should Grant a Writ of Certiorari Where Petitioner Raises No Compelling Reason for Such Review.

3. Whether This Court Should Review Petitioner's Case, Having Previously Thrice Denied Such Request, Where No Changes in Circumstances Have Occurred.

LIST OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES

Respondent, American Cyanamid Company ("Respondent"), is a wholly-owned subsidiary of American Home Products Corporation ("AHPC"). Shares of AHPC are publicly held.

International Home Foods, Inc. is an affiliate of Respondent and is owned by AHPC Subsidiary Holdings Corp. AHPC is the primary shareholder of AHPC Subsidiary Holdings Corp.

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STATEMENT OF THE CASE

A. Introduction and Summary

Arthur Hollander's (hereinafter "Petitioner") Brief submitted in support of this Petition for a Writ of Certiorari fails fully to disclose to this Court the long and tortuous procedural history of this case. This is the *fourth* time that Petitioner has asked this Court for review of this very matter. The last time was in 2000, when this Court denied Petitioner's *second* petition for rehearing which contended that this Court's ruling in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), merited such leave. *Hollander v. Am. Cyanamid Co.*, 531 U.S. 940 (2000). There have been no changes in circumstances since that 2000 ruling. Petitioner confuses persistence with merit; his case did not merit review in 2000 and it does not merit review today.

After this Court's last refusal to grant relief, Petitioner turned back to the United States District Court for the District of Connecticut. Petitioner argued that, despite this Court's refusal to grant certiorari, the District Court should allow him to relitigate the case based on *Reeves*. The District Court, recognizing that a mere change in decisional law did not warrant the relief Petitioner sought, dismissed Petitioner's motion. (Order of Dist. Ct., dated Dec. 28, 2000, stating that the "case [was] closed" and that the "Court will not accept further pleadings under this docket number.")

In still another attempt to breathe life into a dead case, Petitioner appealed that denial to the United States Court of Appeals for the Second Circuit. The Second Circuit dismissed his appeal as "frivolous".

To prolong this sixteen-year-old case, Petitioner now turns to this Court still again. This Court has already denied Petitioner's requests for Court review of his case in light of the *Reeves* decision. No changes in circumstances have occurred since that denial. Moreover, the proposition advocated by Petitioner – reversing a judgment due solely to precedential evolution – has never been adopted by any court and, in any event, no such change in precedent occurred here. Finally, despite Petitioner's contentions to the contrary, the Second Circuit continues to adhere to this Court's relevant precedent. In short, Petitioner has identified no reason for this Court to review his case. It is time for this Court to put an end to this litigation.

B. Relevant Facts and Proceedings

Petitioner seeks a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit dismissing his appeal, of the District Court's denial of his "Motion for Relief," as frivolous.

Petitioner brought this suit against Respondent on August 23, 1985, alleging, primarily, a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. After four years of litigation, Respondent moved for summary judgment on all counts. The District Court then entered summary judgment on Petitioner's ADEA and retaliation claims. On appeal, the Second Circuit affirmed with respect to the claim of retaliation, but vacated and remanded with respect to the ADEA claims because Respondent had not been allowed

adequate discovery. *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990).

After seven years of massive discovery, Respondent filed a Motion for Summary Judgment on all then-remaining counts. The District Court granted that motion. *Hollander v. Am. Cyanamid Co.*, 999 F. Supp. 252 (D. Conn. 1998). Petitioner again appealed to the Second Circuit which affirmed the District Court's ruling. *Hollander v. Am. Cyanamid Co.*, 172 F.3d 192 (2d. Cir. 1999). Thereafter, Petitioner filed a motion for reconsideration with the Second Circuit, which was denied.

Petitioner then began his next set of appeals. Before this Court granted certiorari to the Fifth Circuit's ruling in *Reeves v. Sanderson Plumbing Prods.*, 197 F.3d 688 (5th Cir. 1999), *rev'd*, 530 U.S. 133 (2000), Petitioner petitioned this Court for a writ of certiorari. This Court denied that petition. *Hollander v. Am. Cyanamid Co.*, 528 U.S. 965 (1999).

Next, Petitioner moved this Court to reconsider its denial in light of the Court's decision to grant a writ of certiorari in *Reeves*; this Court again denied Petitioner's motion. *Hollander v. Am. Cyanamid Co.*, 528 U.S. 1107 (2000).

After this Court's ruling in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), Petitioner filed still another motion with this Court for leave to file a *second* petition for rehearing contending that the Court's ruling in *Reeves* merited such leave. Once again, this Court

denied his motion. *Hollander v. Am. Cyanamid Co.*, 531 U.S. 940 (2000).[1]

Persisting in his crusade to prolong this litigation, in November 2000, Petitioner moved the District Court to reopen his claim. He argued again that in light of *Reeves*, Federal Rule of Civil Procedure 60(b)(5) (hereinafter "Rule 60(b)(5)") required the District Court to overturn the Second Circuit's 1999 decision affirming summary judgment in his case. The District Court denied Petitioner's motion outright, forbidding "further pleadings under this docket number."

Petitioner, once again, appealed the District Court's decision. The Second Circuit dismissed Petitioner's appeal as frivolous. Undeterred, Petitioner asks this Court, for the *fourth* time, to grant certiorari.[2]

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[1] Petitioner's presumption that this Court denied his second petition for rehearing "presumably on the basis that [this Court] relies on the courts below to administer its doctrines under uniform and equitable justice," is unfounded and merely demonstrates Petitioner's personal frustration and disagreement with the negative results of his case. (Pet. for Writ of Cert., at 5.) Indeed, in its unanimous denial, this Court offered no explanation of its decision. *Hollander v. Am. Cyanamid Co.*, 531 U.S. 940 (2000).

[2] Because this appeal concerns only whether this Court should grant a writ of certiorari based solely on precedential evolution, Respondent will not indulge Petitioner, as it has in the past, with a refutation of all the factual allegations of his original suit. This Court – consistent with the limited scope of this petition – should similarly refuse Petitioner's invitation to revisit the underlying facts of this case yet again.

ARGUMENT

Impervious to the unbroken string of adverse rulings, Petitioner persists in his view that this Court's decision in *Reeves* entitles him to a new trial. Regardless, Petitioner cannot circumvent this Court's previous denials of identical requests to review his case in light of *Reeves*. Moreover, despite his assertion to the contrary, the Second Circuit's precedent does not conflict with the decisions of this Court. In addition, no compelling reasons exist to warrant a new trial of Petitioner's sixteen-year-old claims. Petitioner has already had his day in court. He is not entitled to another. Rather, the facts of this case demand that Petitioner be precluded from bringing repetitious and abusive litigation.

A. The Second Circuit Correctly Found Petitioner's Self-Styled "Motion for Relief" Frivolous.

Petitioner's appeal to the Second Circuit, and now this Court, was and is frivolous. Indeed, Petitioner has continued to plead with courts to revisit the summary judgment ruling because of an alleged change in precedent. In so doing, he claims that this Court overturned *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (in banc), cited by the Second Circuit in its summary judgment decision, and that such "reversal" justified Rule 60(b)(5) relief in his case. Even assuming, for purposes of this argument only, that this Court did overrule the *Fisher* decision, Rule 60(b)(5) does not provide any relief to Petitioner for that reason alone.

As this Court is aware, a *"Rule 60(b) motion is not a substitute for an appeal." Chan v. Reno*, 932 F. Supp. 535, 539 (S.D.N.Y. 1996) (emphasis added). A motion pursuant to Rule 60(b) "is addressed to the sound discretion of the district court with appellate review limited to determining whether that discretion has been abused." *Nemaizer v. Baker*, 793 F.2d 58, 61-62 (2d Cir. 1986); *Employers Mut. Cas. Co. v. Key Pharms.*, 75 F.3d 815, 824 (2d Cir. 1996). Furthermore, because Rule 60(b) "allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer*, 793 F.2d at 61. Given the established precedent underlying Rule 60(b), there can be no doubt that the Second Circuit correctly dismissed Petitioner's appeal of the District Court's ruling.[3]

Absent special circumstances, no change in decisional law, itself, warrants reopening Petitioner's sixteen-year-old case. Indeed, it is well-established that precedential evolution alone *does not* merit Rule 60(b)(5) relief. *See, e.g., Marshall v. Bd. of Educ.*, 575 F.2d 417, 424 (3d Cir. 1978); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972); *Wallace Clark & Co. v. Acheson Indus., Inc.*, 394 F. Supp. 393, 396 n.4 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 846 (2d Cir. 1976). Rather, a party seeking such drastic relief must also demonstrate special circumstances

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[3] Petitioner astonishingly supposes that the Second Circuit "did not accept the fact that the *Fisher* decisional law was abrogated, and on this basis" dismissed his appeal. (Pet. for Writ of Cert. at 5-6.) Such speculation contradicts the fact that the Second Circuit *did not* expound on its decision, but rather merely found Petitioner's latest appeal to that court "frivolous". (Order of Cir. Ct., dated May 24, 2001.)

warranting the use of the Rule. *Nemaizer*, 793 F.2d at 61. In both his motion to the District Court and his appeal to the Second Circuit Petitioner failed to – and could not – identify any special circumstance justifying the relief he sought.

In the end, the District Court, in 1998, granted Respondent's motion for summary judgment because it found that Petitioner failed to create a genuine issue of material fact that his discharge was because of his age. That decision has been extensively reviewed by both the district court and the Second Circuit as well. Moreover, this Court has *thrice* declined further review of this claim. Under these circumstances, it cannot be said that the Second Circuit incorrectly dismissed Petitioner's appeal nor that it was mistaken in finding the appeal frivolous. Accordingly, this Court should, once again, decline Petitioner's invitation to review this case.

B. The Second Circuit, As It Did In Petitioner's Case, Follows This Court's Relevant Precedent.

Petitioner's request of the lower courts to reopen his litigation was fatally flawed. His argument that this Court overturned the Second Circuit's decision in *Fisher*, is inaccurate and immaterial to that court's affirmance of summary judgment in his case.[4] Moreover, the Second

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[4] Although the Second Circuit arguably relied partially on the *Fisher* decision in its 1999 affirmance, that case did not play a decisive role in the holding in favor of Respondent nor has the *Fisher* decision been overruled in this Court. Attempting to persuade this Court that the District Court relied on the *Fisher*

Circuit, as it did in Petitioner's case, follows the mandates of this Court's *Reeves* decision.

Petitioner argues, once again, that the Second Circuit, in its 1999 decision, relied on *Fisher* by requiring him to provide independent evidence of discrimination in addition to demonstrating a prima facie case and pretext. That argument misstates the Second Circuit's holding. In fact, the Second Circuit did not require Petitioner to prove additional independent evidence of discrimination, because it did not find that Petitioner even established pretext.[5] Rather, the Second Circuit found that Petitioner

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decision when granting summary judgment for Respondents, Petitioner mischaracterizes the Second Circuit's language in *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000). (Pet. for Writ of Cert. at 12-13.) In fact, *Schnabel* merely stated that "to the extent that . . . *Hollander* imposed [a per se rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext it] no longer may be followed." *Schnabel*, 232 F.3d at 90. Such a statement cannot, in any way, be said to hold that the panel in *Hollander actually* applied such a per se rule, nor can it be said that the Second Circuit acknowledged that the *Fisher* decisional law was imposed in *Hollander*.

[5] Petitioner's gross mischaracterization of the Second Circuit's language in *Schnabel* further demonstrates his misunderstanding of that Circuit's precedent. In his Petition, Petitioner states that the *Schnabel* court "confirmed that *Hollander* had established a prima facie case and sufficient evidence of pretext, and then was required to provide additional, independent evidence to survive summary judgment." (Pet. for Writ of Cert., at 7.) In fact, the *Schnabel* court *never* commented on the substance of Petitioner's case. Rather, the court merely looked to the *Hollander* decision to "decide whether [that case was] still good law in the wake of the [this] Court's decision in *Reeves*." *Schnabel*, 232 F.3d at 89-90

did no more than meet the minimal burden of establishing a prima facie case, which was not enough to survive summary judgment.[6] Such paucity of evidence is not enough to survive summary judgment under any interpretation of the *McDonnell Douglas* standard. *See, e.g., Reeves*, 530 U.S. at 148-49. Petitioner's argument that *Fisher* no longer continues to be good law, therefore, remains without merit, does not justify any Rule 60(b)(5) relief, and fails to provide a compelling reason for this Court to grant certiorari in this case.

Even assuming that the *Fisher* decision played a decisive role in the Second Circuit's affirmance of summary judgment, that court itself foreclosed Petitioner's argument that *Reeves* overturned *Fisher*. *See Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000); *James v. N.Y. Racing Ass'n*, 233 F.3d 149 (2d Cir. 2000). Indeed, the Second Circuit, reaffirming the applicability of *Fisher*'s analysis, held that

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(finding that "to the extent that . . . *Hollander* imposed [a per se rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext it] no longer may be followed."

[6] In its holding, the Second Circuit stated:

> "If reliance on Hollander's alleged interpersonal problems was indeed a pretext – *and we repeat that we are not so holding* – the record before us shows that the stated reason may have been a pretext for various non-discriminatory reasons. This is not a case in which a finder of fact could reasonably conclude that Hollander's termination was, more probably than not, due to age discrimination because no other, non-discriminatory explanation was possible."

Hollander v. Am. Cyanamid Co., 172 F.3d 192, 201-02 (2d Cir. 1999) (citations omitted) (emphasis added).

"the Supreme Court's reasoning in Reeves is wholly compatible and harmonious with [the] reasoning in Fisher. There is no inconsistency between the two rulings." James, 233 F.3d at 155 (emphasis added). *See also, Schnabel*, 232 F.3d at 90 n.5 ("We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate inference in any other civil case.")

Petitioner's argument that he is entitled to a new trial based on precedential evolution and the Second Circuit's split with this Court's precedents, therefore, emerges unsubstantiated. In fact, there is no underlying change in the law relied on by the Second Circuit in its affirmance of summary judgment, nor do any opinions of the Second Circuit conflict with this Court's precedent. Rather, Petitioner's unsupported allegations amount to, at best, one of those circumstances where a prima facie case, combined with the employee's attack on the employer's explanation, was not enough to survive summary judgment. *See James*, 233 F.3d at 155-56; *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3092 (U.S. July 31, 2001) (No. 01-197).

The Second Circuit, as explained above, follows this Court's precedent as set forth in *Reeves*. Moreover, this Court did not overrule *Fisher* in handing down the *Reeves* decision. Regardless, *Fisher* was of no consequence in the Second Circuit's summary judgment decision at issue here. Accordingly, no compelling reason exists for this Court to review Petitioner's case.

C. This Court Has Previously Denied Petitioner's Identical Request And Should, Therefore, Deny This Request Again.

Petitioner seeks a writ of certiorari based on the *very same* arguments this Court previously found unpersuasive in his second petition for rehearing just one year ago. (*Compare* Pet. for Writ of Cert. (01-284), at 9 *and* Pet. for Reh'g (2000), at 6.) Indeed, in his attempt to hide behind Rule 60(b)(5), and simultaneously abuse the appellate process, Petitioner has masked what is actually a *third* request to this Court for rehearing his case. To permit Petitioner to employ such strategies undermines society's powerful interest in the finality of judgments. Accordingly, this Court should once again deny review, as it has done three previous times.

"Review on a writ of certiorari *is not a matter of right*, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 (emphasis added). Petitioner has neither demonstrated nor offered any such compelling or special circumstances. In fact, this petition does not fall within the character of reasons enumerated in Rule 10: It does not present a conflict among the lower courts or with a relevant decision of this Court,[7] or involve an important

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[7] The Second Circuit has squarely foreclosed Petitioner's argument that *Reeves* overturned controlling Second Circuit precedent. *See Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000); *James v. N.Y. Racing Ass'n* , 233 F.3d 149 (2d Cir. 2000). Indeed, the Second Circuit, consistent with this Court's mandates, applies the *Reeves* case-by-case approach. *See, e.g., Schnabel*, 232

question of federal law that has not been, but should be, settled by this Court; and contains no suggestion of departure "from the accepted and usual course of judicial proceedings."

Rather, Petitioner has dragged the present litigation on for nearly sixteen years, through three appeals to the Second Circuit, a denial of certiorari and two denials of rehearing from this Court. Now, Petitioner turns to this Court once again seeking rehearing absent any new legal basis. This Court should stop Petitioner from filing further frivolous requests and motions to this Court, needlessly increasing the cost of litigation and harassing Respondent, by surfacing the same claims again and again.

F.3d at 90; *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 469-70 (2d Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3130 (U.S. Aug. 13, 2001) (No. 01-278); *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 380-81 (2d Cir. 2001). *See also supra* at 7-10.

CONCLUSION

For the reasons set forth above, Respondent requests that this petition for writ of certiorari be denied.

Respectfully submitted,

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